No. 95531-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JARED KARSTETTER and JULIE KARSTETTER,

Petitioners,

v.

KING COUNTY CORRECTIONS GUILD,

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF [CORRECTED]

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I. STATEMENT OF FACTS

Jared Karstetter is a 63 year old man who has dedicated most of his adult life to advancing the rights of public employees. Mr. Karstetter's dedication and service on behalf of King County Corrections Officers began 1975 when he first served as a corrections officer.[1] Subsequently, he became an employee of the union representing the corrections officers with successive five-year contracts providing for just cause termination.[2]

On March 4, 2016, Mr. Karstetter was contacted by the King County Ombudsman's Office regarding a whistleblower complaint involving parking reimbursement to two Guild officers, one of whom was the Guild President. The Guild Vice President directed Mr. Karstetter to cooperate fully with the Ombudsman. Pursuant to the King County Code §3.42.057(F), Mr. Karstetter would be compelled to produce documentation requested by the Ombudsman.[3] Mr. Karstetter complied with the King County Code and, after receiving authorization from the Guild Vice President, produced the documentation requested by the Ombudsman.

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[1]Appx. at 2 (the Declaration of Jared Karstetter in Support of Answer to Motion for Discretionary Review was submitted as part of the Appendix to Respondent's appellate brief in the court below)(hereinafter referred to as "Appx.")

[2] A more thorough explication of the facts is contained in Mr. Karstetter's Petition to Review and in the decision of the court below, 1 Wn.App. 2d 822 (2017).

[3] For the Court's convenience, Section 3.42.057 of the King County Code is in the Appendix to this brief.

This act became the ostensible reason for his discharge. (CP 6-7).[4]

II. ARGUMENT

A. Mr. Karstetter's Discharge for Exercising His Legal Duty And Obligation To Provide Documents In A Whistleblowing Case Constitutes Wrongful Discharge In Violation Of Public Policy

In *Dicomes v. State*, 113 Wn.2d 612, 618, 792 P.2d 1002 (1989) this Court established four categories of protected public policy behavior: 1) refusing to commit an illegal act; 2) performing a public duty or obligation; 3) exercising a legal right or privilege; or 4) whistleblowing (hereinafter referred to as "*Dicomes* categories").

Assisting a public official in an official investigation falls squarely in *Dicomes* category #2 – "where the discharge resulted due to the employee performing a public duty or obligation." Nothing in *Dicomes* or its progeny removes activity from the protections of the public policy tort if the activity results from a subpoena or a law that compels cooperation in an investigation.

Karstetter's action also falls within *Dicomes* area #4 – "where the employee was fired for reporting employer misconduct." Here, Karstetter reported to the King County Ombudsman misconduct by a Guild officer – a representative of his employer. It advances the public interest in law

[4] On April 27, 2016, the Guild summarily terminated Mr. Karstetter's employment without warning, opportunity to confer with the Executive Board or any observation of the contractual just cause standards. It did so after more than four years into a five-year employment contract term (CP 1-16).

enforcement and investigation of misuse of public funds to encourage employees to cooperate with investigation of such issues. *See: Gaspar v. Peshastin Hi-Up Growers*, 131 Wn.App. 630, 128 P.3d 627 (Div. III, 2006), wherein a general manager sued his employer alleging that he was fired for assisting a police investigation about his employer's questionable purchases of postage stamps. Citing *Gardner v. Loomis Armored Inc.* ,for the proposition that there is a clear public policy encouraging citizens to assist law enforcement, the *Gaspar* court held that "recognition of a public policy to assist law enforcement is fundamental," opining that "[t]here is no public policy more important or more fundamental than the one favoring effective protection of the lives and property of citizens." *Id.* at 637.[5]

In *Gardner v. Loomis Armored Inc.,*[6] 128 Wn.2d 931, 941, 913 P.2d 377 (1996), a case which did not fit squarely within any of the four *Dicomes* categories, this Court articulated a four-part test for establishing a wrongful discharge claim: 1) a plaintiff must prove the existence of a clear public policy (the "clarity" element); 2) a plaintiff must prove that discouraging the conduct in which s/he engaged would jeopardize the public policy (the "jeopardy" element); 3) a plaintiff must prove that the

[5] The issue here – seeking unjustified reimbursement by the County for parking – is a misappropriation of citizen's tax monies.
[6] 128 Wn.2d 931, 913 P.2d 377 (1996).

public-policy-linked conduct caused the dismissal (the "causation" element; and 4) the employer must not be able to offer an overriding justification for the dismissal (the "absence of justification" element). This four-part test is referred to as the "Perritt framework" because it was based on an academic treatise by Professor Henry Perritt Jr.[7]

In the *Rose* Trilogy,[8] this Court held that courts should not apply the Perritt framework in cases that present one or more of the *Dicomes* scenarios:

> [W]hen the facts do not fit neatly into one of the four [*Dicomes*] categories, a refined analysis may be necessary. In those circumstances, the courts should look to the four-part Perritt framework for guidance. But that guidance is unnecessary . . . [where] the facts fall directly within the realm of wrongful discharge in violation of public policy.

Rose v. Anderson Hay & Grain, 184 Wn.2d at 287. Thus, where, as here, an employee alleges that his conduct falls within one or more *Dicomes* category and that such conduct was a substantial factor motivating his discharge, he has met his burden of proving the tort of wrongful discharge. *Rickman*, 184 Wn.2d at 314. No more "refined analysis" using the Perritt framework is warranted. *Rose*, 184 Wn.2d at 287.

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[7] Henry J. Pettitt Jr., Workplace Torts: Rights and Liabilities, 1991.

[8] *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 358 P.2d 1139 (2015); *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 358 P.3d 1153 (2015); and *Becker v. Community Health Sys., Inc.*, 184 Wn.2d 252, 358 P.3d 746 (2015).

The court below erred in dismissing Mr. Karstetter's case because he had not complied with the Perritt framework. Having demonstrated that his case fell within two of the four *Dicomes* categories, he did not have to do so. By setting forth in his complaint that his discharge resulted due to his performance of a public duty or obligation, and that he was fired for reporting employer misconduct (CP 6), no more "refined analysis" was necessary to proceed to trial with his case. *Rose*, 184 Wn.2d at 287.

Mr. Karstetter respectfully requests that this Court reverse the erroneous decision of the appellate court and remand this case for trial.

B. The Court Below Improperly Failed To Distinguish Between Employment Agreements For In-House Attorneys And Retainer Agreements With Private Counsel

Washington has a long history of protecting employee rights and preventing employers from abusive employment practices. *See e.g.:* RCW Chapter 49, RCW 39.12, RCW 18.27.040, RCW 60.04, RCW 60.28, and RCW 39.08. Indeed, the Washington Supreme Court frequently has noted "Washington's long and proud history of being a pioneer in the protection of employee rights." *Drinkwitz v. Alliant Techsystems, Inc.,* 140 Wn.2d 291, 300, 996 P.2d 582 (2000); *accord: Pellino v. Brink's Inc.*, 164 Wn.App. 668, 684, 267 P.3d 383 (Div. I, 2011). The appellate court's opinion deviates from that "proud history."

Across the State of Washington and this nation, multitudes of members of the Bar are employed by corporations, unions, governmental agencies and other corporate entities.[9] To protect their status as employees, and prevent arbitrary treatment by their employer, these "in-house" lawyers often have contracts with their one employing entity providing terms and conditions of their employment and due process procedures for discharge.[10] Such arrangements are fundamentally different from a retainer between a client and an attorney in private practice whose income is derived from representing numerous clients. An in-house attorney, in all respects, is an employee[11] with the same concerns and vulnerabilities as a non-lawyer employee; and in some respects is even more worthy of protection given the importance to their reputation and ability to perform as an attorney elsewhere in the legal community.

But despite Washington's long and proud history, the appellate court's decision invalidates employment agreements between employers and only those employees who fall within the narrow band of those who have a law license. To reach such anomalous result, the court below relied on cases involving lawyers in private practice. *E.g: LK Operating, LLC v.*

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[9] *See:* For In-House Counsel, Safety in Numbers, A.B.A. Journal, Jan. 1995, at p. 28.
[10] These are hypothetical facts of which the Court may take notice pursuant to CR 12(b)(6). *Portfolio Mgt. v. Tremont Grp. Holdings, Inc.,* 180 Wn.2d 954, 962, 331 P.3d 29 (2014).
[11] Both the Guild and the appellate court acknowledged that Mr. Karstetter was an employee of the Guild. 1 Wn.App.2d 822 at fn. 12.

Collection Group, LLC, 181 Wn.2d 48, 331 P.3d 1147 (2014).[12] In that case, as cited by the appellate court, the "RPCs are clearly directed at promoting the public good and preventing public injury." *Id.* at 86-87. Such considerations are in recognition of the relative lack of sophistication inherent in the non-legally trained public versus the presumptively more sophisticated and legally trained provider of legal services. There is no basis for such considerations where a corporation such as the union here seeks to hire an attorney, not for one legal matter at a fee dictated by the attorney, but for full-time employment at compensation negotiated between the parties and to perform duties dictated by the employer.

In *LK Operating*, this Court analyzed former RPC 1.8(a) and whether the terms of a joint venture proposal between an attorney and client were unfair to the client's interests, or if there lacked an appreciable disclosure of terms to the client. When considering whether a contract is unenforceable because it violates public policy, the Court has to decide whether the contract itself is injurious to the public. *Id.* at 87. Clearly, a contract of employment – ***even one that involves an attorney-employee*** – is neither prohibited, nor does it violate the public good. Even when a RPC violation is asserted as a defense to a contract claim, there is no rule that declares such contracts as automatically unenforceable. *Id.* at 87-88.

[12] 1 Wn.App. 822, 827-28.

Referring to its reluctance to impose a strict rule, this Court stated:

> Such a holding would shift the guiding inquiry from whether the *contract* is injurious to the public to whether the *RPC violation* is injurious to the public — the former is relevant when determining whether a contract is unenforceable because it violates public policy, while the latter is relevant in attorney disciplinary proceedings. It would also ignore the clear admonishment that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons."

Id. (*citing* Model Rules, Scope at ¶ 20) (*italics and internal quotes in the original*).

Clearly the Guild cannot be considered an unsophisticated consumer of legal services that needed protection. It had negotiated employment contracts with Mr. Karstetter for decades; it was represented in negotiation of such contracts by an outside attorney, and successfully dictated many of the crucial provisions of those contracts.[13] Although the appellate court opined that "Karstetter cannot show that the challenged contract terms do not violate the policy behind the applicable RPC" (1 Wn.App at 828), that conclusion ignored the declarations in the record attesting to the knowlhedge and sophistication of the Guild as a consumer of legal services and its decades-long participation in an employment relationship with Mr. Karstetter. By so doing, the appellate court ignored the admonishment of this Court in *LK Operating* that "the purpose of the

[13] *See*: Appx. 2-6; 8-14; 25-31.

Rules can be subverted when they are invoked by opposing parties as procedural weapons."[14]

The admonishment is particularly relevant here where the employer simply invoked RPC 1.16 to defend against its misdeeds and establish a plausible excuse for terminating the employee after four years into a five-year term.[15] Even assuming *arguendo* that Mr. Karstetter's employment agreement violated RPC 1.16,[16] the case should have been remanded to the trial court to conduct a separate factual inquiry outside the context of the Guild's 12(b)(6) motion.[17] Like the inquiry in *LK Operating*, there will be additional relevant facts, documents and witness perspectives that are more appropriate for consideration by the trial court in the context of a CR 56 summary judgment motion. *LK Operating*, 181 Wn.2d at 73 (*e.g., what was the contractual intent of the Guild officers when contracting with its attorney-employee and repeatedly extending his contracts?*). An attorney's compliance or non-compliance with ethical rules is likely a factual inquiry that cannot be resolved easily on summary judgment, let alone a 12(b)(6) motion to dismiss. *See e.g., Simburg,*

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[14] The appellate court erroneously asserted that "Karstetter identifies no facts or hypothetical facts that would support a finding that the termination provision does not violate public policy." (1 Wn.App.2d at 828).
[15] CP 1-16.
[16] RPC 1.16 governs declining or terminating representation. Nothing in the Rule itself expressly provides that a client may discharge the lawyer at will – that concept appears only in the Comment to the Rule entitled "Discharge" at [4].
[17] CP 17-30.

Ketter, Sheppard & Purdy, LLP v. Olshan, 109 Wn.App. 436, 445-46, 988 P.2d 467 (Div. I, 1999).

As the tort of wrongful discharge continues to evolve, courts in other jurisdictions have expanded it to cover in-house counsel like Mr. Karstetter. *See, e.g.: Nordling v. Northern States Power Co.*, 478 N.W.2d 498 (Minn. 1991); *Mourad v. Automobile Club Insurance Assoc.*, 465 N.W.2d 395 (Mich. Ct. App. 1991); *Parker v. M &T Chemicals, Inc.* 566 A.2d 215 (N.J. Sup. Ct. App. 1989). *See also: General Dynamics Corp. v. Superior Court*,[18] wherein the court held that corporate counsel should be permitted to pursue public policy wrongful discharge because attorney's work affects the public interest and because corporate counsel are more likely to experience conflicts between corporate goals and professional ethics. It reasoned that permitting public policy wrongful discharge cases would give lawyers greater incentive to challenge employer's misdeeds rather than remaining silent for fear of discharge. 876 P.2d at 501.[19]

The appellate court in *Karstetter* attempted to distinguish *General Dynamics* as "not helpful ...because the California Supreme Court has

[18] 7 Cal. 4th 1184, 876 P.2d 487 (Cal. 1994)(en banc).

[19] One note writer in Washington has described the rationale for extending the doctrine of wrongful discharge in violation of public policy to in-house counsel as follows: "If courts deny these causes of action, they would be protecting mostly 'scoundrel' employers who discharge in-house counsel for upholding the law and ethics. On the other hand, recognition of these wrongful discharge actions would facilitate resolution of disputes between in-house counsel and corporate officers within the corporate organization." Comment: In-house Counsel's Wrongful Discharge Action Under The Public Policy Exception And Retaliatory Discharge Doctrine, 67 Wash. L. Rev. 893, 906 (1992).

limited a client's right to discharge its attorney in a way that our Supreme Court has not," citing *Kimball v. Public Utility District No. 1*, 64 Wn.2d 252, 391 P.2d 205 (1964). The *Karstetter* court described the limitation as "a client's right to fire an attorney without liability for future damages to contingent fee personal injury cases," citing 876 P.2d at 494-95. Nothing in *General Dynamics* involved contingent fee personal injury cases. Perhaps the court below had confused *General Dynamics* with *Fricasse v. Brent,* 6 Cal. 3d 784, 494 P.2d 9 (1972), a case cited and distinguished by the *General Dynamics* court as resulting in "an intuitively unjust, even outrageous, result."876 P.2d at 494. Accordingly, the *General Dynamics* court held that it was "not constrained" by *Fracasse* and allowed the in-house attorney's suit for wrongful discharge proceed. *Id.* at 495.

Similarly, this Court should not be constrained by *Kimball*, which involved a fee agreement between a private law firm and a public entity. Unlike Mr. Karstetter, Mr. Kimball and his partner Mr. Clark were not employees of the PUD, but rather were independent contractors engaged to provide legal services through a retainer agreement. The appellate court in *Karstetter* erroneously determined that it was "obligated to follow" the

holding in *Kimball*, rather than *General Dynamics*. 1 Wn.App.2d at 831.[20]

Allowing in-house counsel to sue for wrongful discharge in violation of public policy is an appropriate component of the evolution of the tort. *See:* Note: Establishing Corporate Counsel's Right to Sue For Retaliatory Discharge, 29 Val.U.L.Rev. 1343 (1995). The Note's author posits the following:

> Currently, there is a growing need for giving in-house attorneys the right to sue for retaliatory discharge. This originates from a recent trend of corporations hiring in-house attorneys, instead of using outside law firms, to resolve their legal problems. Thus, a growing number of in-house attorneys will likely be confronted with difficult situations. ... Unlike independent attorneys, in-house attorneys have only one client, the corporation. Typically, when a conflict arises between an attorney and a client, the recommended remedy is withdrawal. Yet attorneys with the corporation as their sole client have found withdrawal to be problematic and sometimes an unfeasible solution. In-house counsel are faced with a dilemma when their ethical obligations come into conflict with their employers requirements. They must choose between maintaining their professional and ethical obligations and keeping their job and risking reprimand or disbarment. A new path must be created to provide these attorneys with a solution to their dilemma, one that allows them to disclose wrongdoing

[20] As noted above, the law of wrongful discharge in violation of public policy has evolved appreciably since 1964 when *Kimball* was decided. As the Massachusetts Supreme Court noted in *GTE Products Corp. v. Stewart*, 421 Mass. 22, 653 N.E. 2d 161, 165 (1995): "there [are] sound reasons for recognizing the right of in-house counsel to sue for wrongful discharge... a claim of wrongful discharge protects more than the private interests in job security and professional reputation of the claimant. Protection of the policy expressed in the statute or rule claimed to have been violated by the employer is equally at stake, and the claimant's status as an attorney does not diminish the public interest in the furtherance of that policy." *See also:* Note: The Impact of *General Dynamics Corp. v. Superior Court* on the Evolving Tort of Retaliatory Discharge For In-House Attorneys, 52 Wash & Lee L. Rev. 991 (1995).

without fear of unemployment.

Id. at 1350-51. This is exactly the dilemma that faced Mr. Karstetter when the Ombudsman requested that he provide documents in the Guild's possession necessary to a County investigation. Knowing that these documents could be subpoenaed and that his employer could be sanctioned for refusing to produce them, Mr. Karstetter knew he must act both to comply with the law and to protect his employer, the Guild.[21] He was cautious – he sought and received permission from a union officer. He then produced the documents, an act that resulted in his discharge. Despite Mr. Karstetter's action to comply with the King County Code and to produce documents needed to complete a whistleblowing investigation, the appellate court denied him access to pursue justice in the courts. Such result, as described by the *General Dynamics* was "an intuitively unjust, even outrageous, result." It should be reversed.

C. The Appellate Court's Decision Ignores The Legal Standard For CR 12(b)(6) Motions

At the beginning of its analysis, the court below stated:

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[21] The Comment in the Washington Law Review addresses this issue: "Within a corporate setting, an in-house counsel may be faced with the question of who the client is. Under the entity representation doctrine, an in-house counsel represents the corporate organization [here, the Guild] which acts only through its duly authorized constituents. The counsel's fiduciary duty is owed to the interest of the corporation and not to a single stockholder, director, officer or employee of the entity. Yet in all corporate settings, the counsel is directed by individual officers because the corporation can only function through its constituents. However, when the objectives of an officer and the corporation diverge, the –n-house counsel is required to pursue the best interest of the corporation even if it means repudiating the officer's interest." *Id.* at 899.

> CR 12(b)(6) allows a court to dismiss a claim only when it appears beyond doubt that the claimant can prove not set of facts, consistent with its complaint, which would justify recovery. The court assumes the truth of all facts alleged in the complaint and may consider hypothetical facts supporting the claim. The … court should grant a CR 12(b)(6) motion "sparingly and with care" in the unusual case where the claimant's allegations show an insuperable bar to relief on the face of the complaint.

1 Wn.App.2d at 386; citing *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995), and *FutureSelect Portfolio Mgt. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014). The appellate court then proceeded to violate those principles of civil procedure.

Mr. Karstetter's complaint set forth facts substantiating both his breach of contract and wrongful discharge claims, especially if the appellate court had followed the dictates of settled law that as the nonmoving party, Mr. Karstetter was entitled to the benefit of all reasonable inferences and hypotheticals. *FutureSelect, supra* at 962. In addition to the facts in the complaint and in the record noted above, there are additional facts as to Mr. Karstetter's actual job duties that the appellate court failed to consider in its ruling. The Guild challenged its employment contract on the theory that a client can discharge its attorney at any time. However, the record in this case establishes that "the vast majority of [Karstetter's] job duties [was] consistent with that of Business Representative." Appx. 3. When the Guild replaced Local 519 as

Karstetter's employer, he "primarily provided labor relations services; [his] role was not any different from [his] prior position with Local 519. [He] continued to provide traditional labor relations services, which does not require a law license..." Appx. 4. Mr. Karstetter's non-lawyer job duties were confirmed in the record by a King County management representative, Claudia Balducci, as follows:

> In all of my dealings with Mr. Karstetter, he served as the primary, day-to-day representative of the Corrections Guild.... Throughout my years serving DAJD, I worked with a number of unions and their representatives. Several unions employed in-house, business representatives who served as the primary representative of the local union to management. [Gives examples]. In these other cases, the business representative was a paid employee of the union and the person I would use as the point of contact for that union. From my position as a management representative, the roles of these business representatives were very similar to Mr. Karstetter's role on day-to-day labor-management matters, for the Corrections Guild.

CP 131-132.

The exhibits to the Complaint – Mr. Karstetter's 2011 and 2006 contracts, confirm the fact that the bulk of his job duties were non-lawyer in nature (CP 11-16). The paragraph in the 2006 contract, entitled "Labor Relations Services" states:

> KARSTETTER agrees to provide the GUILD, in exchange for the fee set forth below, the following services: (1) Assist the GUILD at negotiations, mediation, and arbitration proceedings in collective bargaining negotiations and assist in the preparation of routine documentation to support GUILD's position in negotiations; (2) The preparation and conduct of GUILD's case in

> any grievance arbitration or Personnel Board discipline hearings where the agreement does not provide for the arbitration of discipline; (3) The preparation and conduct of GUILD's case in any matters before the Public Employment Relations Commission of the State of Washington or any appropriate court (to the extent that he possesses the expertise); (4) initial representation of GUILD members in the event of an internal investigation, officer involved shooting, death investigation, or other use of force or automobile accident requiring the provision of statements that could lead to criminal liability or discipline and any internal investigation initiated against any member; (5) the drafting of letters, and the conduction of any telephone calls and miscellaneous work related to the above and (6) Attend any meetings as requested by the Executive Board of the GUILD. (7) perform any and all other work assigned to Karstetter that he is competent to perform on behalf of the GUILD.

CP 14. The 2011 contract provides for similar duties under the title: "Collective Bargaining/Representation," and further limits his authority to only those duties approved by the Guild President and Executive Board (CP 11, 13).

None of the foregoing duties except court appearance (which is expressly limited to his expertise) requires a licensed attorney. Accordingly, even if RPC 1.16(a)(3) were applicable to Mr. Karstetter's employment contract, it did not require or permit invalidation of his entire contract. The Guild could remove an assignment, if any, that required a license to practice law and the plethora of non-lawyer job duties could remain for which his contract would be enforceable. The appellate court's decision to the contrary is reversible error.

D. The Court Below Erroneously Held That Mr. Karstetter Did Not Plead All Elements Of Wrongful Discharge

Washington is a notice pleading state. CR 8 provides, in pertinent part, that: "A pleading … shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment…". Washington courts have held that the rule does not require parties to state all of the facts supporting their claims in their initial complaint. *Bryant v. Joseph Tree*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992). The notice pleading rule contemplates that discovery will provide parties with the opportunity to learn more detailed information about the nature of the complaint. The federal rule requires more details. *Ashcroft v. Iqbal*, 556 U.S. 544, 570, 127 S. Ct. 1955 (2007), but Washington courts do not follow *Iqbal*, relying instead on the parties availability to conduct discovery. *McCurry v. Chevy Chase Bank*, 169 Wn.2d 96, 101-02, 233 P.3d 861 (2010); *Handlin v. On-Site Manager Inc.*, 187 Wn.App. 841, 845, 351 P.3d 226 (2015). Thus, on a CR 12(b)(6) motion such as was before the court below, dismissal would be appropriate only if it appeared beyond doubt that that the plaintiffs cannot prove any set of facts which would have justified recovery. *Id.* at 845. The appellate court imposed a higher standard by dismissing Karstetter's wrongful discharge claim

because he failed to plead all elements of his wrongful discharge claim (1 Wn.App.2d at 391).

Here, the record establishes that plaintiff would be able to prove sufficient facts to justify recovery on his wrongful discharge claim. The complaint avers that he provided information requested by a governmental official to aid in a whistleblowing investigation (CP 6, ¶22), and that he was discharged for that reason (CP 6-7, ¶26). Nothing in CR12(b)(6) requires that at the pleading stage, a plaintiff must plead the elements of the wrongful discharge claim. A pleading is insufficient only when it does not give the opposing party fair notice of what the claim is and the grounds on which it rests. *FutureSelect Portfolio, supra* at 866. It is patently clear from Karstetter's complaint that defendants were given fair notice of his wrongful discharge claim and the grounds on which such claim was based – all that was required at the CR 12(b)(6) stage.

Nonetheless, the appellate court held that his complaint failed to show that "he engaged in public-policy-linked conduct," and accordingly, the "trial court should have dismissed the wrongful discharge claim." 1 Wn.App.2d at 833. The appellate court thereby misapprehended the notice pleading law. Certainly with the benefit of discovery, Karstetter would be able to flesh out the clarity, jeopardy and causation elements of the wrongful discharge tort. But even at the preliminary stage, it cannot

be said that complying with requests for information necessary to the outcome of a public investigation or even complying with a subpoena for such purpose does not fall within the Supreme Court's definition of clear public policy. *Dicomes v. State*, 113 Wn.2d 612, 782 1002 (1989).[22]

But even assuming *arguendo* that Mr. Karstetter were required to plead the Pettitt elements, as appellate court erroneously required,[23] his complaint is sufficient to have survived a CR 12(b)(6) motion to dismiss. His complaint identified the existence of a "clear public policy" (clarity) by referencing the King County Code that required production of requested information (CP 6, ¶22), the jeopardy element that nonproduction would impede a County investigation (jeopardy) (CP 6, ¶22), and the causation element that Mr. Karstetter was discharged for providing information to the Ombudsman (CP 6-7, ¶26). *See*: *Singleton v. Intellisist, Inc.*, 2018 U.S. Dist. LEXIS 77573, 2018 WL 2113973 (U.S. Dist. Ct. W.D. Wn. 5/8/18).

E. Petitioner Is Entitled To An Award Of His Fees And Costs

Petitioner respectfully requests that this Court grant his request for an award of his attorney fees and costs in this court and in the appellate court, pursuant to RAP 18.1 and RCW 49.48.030.

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[22] Clearly Mr. Karstetter's behavior was not for his private or proprietary interests, but rather to further the public good, and thus constituted whistleblowing. *Dicomes*, 112 Wn.2d at 620.

[23] 1 Wn.App.2d at 831.

III. CONCLUSION

For all the foregoing reasons, the Karstetters respectfully request that this Court reverse the decision of the appellate court and remand the case to the trial court for further proceedings.

Dated this 6th day of July, 2018.

LAW OFFICES OF
JUDITH A. LONNQUIST, P.S.
Attorneys for Plaintiffs Jared and
Julie Karstetter

Judith A. Lonnquist, WSBA #06421

APPENDIX

3.42.057 Investigations by ombuds - powers - procedures - fines.

A. The procedures in this section apply to the ombuds when the ombuds is investigating a report of an improper governmental action that is not investigated according to the rules applicable to K.C.C. chapter 3.04, the Employee Code of Ethics.

B. In determining whether to conduct an investigation, the ombuds may consider factors including, but not limited to, the nature and quality of the evidence and the existence of relevant laws and rules; whether the alleged improper governmental action was isolated or systematic; the history of previous assertions regarding the same subject or subject matter; whether other avenues are available for addressing the matter; whether the matter has already been investigated or is in litigation; the seriousness or significance of the asserted improper governmental action; and the cost and benefit of the investigation. The ombuds has the sole discretion to determine the priority and weight given to these or any other relevant factors and to decide whether a matter is to be investigated.

C. If the ombuds elects not to investigate the matter, the ombuds shall, before making a final decision to close the investigation, send a notice to the person who made the report explaining the factors considered and the analysis applied, summarizing allegation deficiencies if any, and providing a reasonable opportunity to reply. The notification may be by electronic means.

D. If the ombuds determines that that the employee reporting improper governmental action has been retaliated against or is at great risk of retaliation, the ombuds may recommend to the head of the department that temporary preventive action be taken, including but not limited to transferring the reporting employee at the reporting employee's request to another department or authorizing leave with pay for the reporting employee. If the ombuds deems it necessary, the ombuds's recommendation may be made to the executive instead. Such temporary preventative action may continue until the conclusion of any investigation and a permanent resolution of the matter.

E. If the ombuds elects to conduct an investigation and it appears to the ombuds that the investigation will take longer than thirty days to complete, the ombuds shall, within thirty days after receiving the report of alleged improper governmental action, provide the complainant with a preliminary written report that summarizes the procedural status of the investigation, the information obtained thus far, any preliminary findings as the ombuds deems appropriate, and identifying

matters for further research or inquiry. The ombuds shall also notify the subject or subjects of the investigation and the agency head of the need for continued investigation.

F. When conducting an investigation, the ombuds may at any stage issue subpoenas, administer oaths, examine witnesses, and compel the production of documents or other evidence; refer the matter to the state auditor, law enforcement authorities or other governmental agency; and issue reports; or any combination thereof, each as deemed appropriate.

G. Upon completion of an investigation, the ombuds shall make a final written report that summarizes the results of the investigation, including findings with regard to each assertion of improper governmental action and recommended actions. The ombuds shall complete the investigation and issue a final report within one year of receipt of the report of improper governmental action.

1. If the ombuds determines that no improper governmental action has occurred, the ombuds shall send the report to the complainant, the subject or subjects of the investigation and the agency head.

2. If the ombuds determines that an improper governmental action has occurred:

a. The ombuds shall give the subject of the report an opportunity to respond before issuing a final report.

b. The ombuds shall send the report to: the complainant; the head of the department with responsibility for the action or if a department head is implicated, to the executive and county council; and such other governmental officials or agencies as the ombuds deems appropriate. The ombuds shall also send a copy of the written report to the executive or the county council if requested to do so by the complainant, if the ombuds has not already done so.

c. The department with responsibility for the improper governmental action shall report back to the ombuds and complainant with an action plan for addressing the improper governmental action and provide reasonable timelines for completing its corrective actions. The department's response should be made within fourteen days of receipt of the ombuds's report. If the ombuds deems that satisfactory action within a reasonable timeframe has not been achieved, the ombuds shall report the ombuds's determination to the executive and the county council.

d. The ombuds may impose a fine of not greater than ten thousand dollars on the department within which the improper governmental action occurred. A fine should be imposed for improper governmental actions that are exceptionally egregious or for which corrective actions have been highly unsatisfactory. The department shall be given a reasonable opportunity to be heard before imposition of any fine. Proceeds collected from any fine shall be deposited into an account to be used for the purpose of educating employees about this chapter or may be applied by the department toward the cost of administrative leave paid to the employee reporting the improper governmental action where the reason for the administrative leave is related to the employee's reporting.

H. At any stage in the investigation, the ombuds may, with the agreement of the parties, recommend, arrange for, convene, or conduct voluntary mediation between the employee and either the subject of the investigation or agency head, or both, with cost sharing, if any, to be determined by the parties.

1. If the parties reach agreement as a result of mediation, the ombuds may close the investigation.

2. The response times from subsection E. of this section shall be tolled for the duration of the mediation process.

3. Mediation and other informal resolution processes are voluntary. No employer or employee shall be pressured into participating in such processes, and no negative inferences shall be drawn if any party declines to participate in such processes. If a party agrees to participate in voluntary mediation or other informal resolution process, that party is under no obligation to accept the resolution recommended by the mediator, the ombuds, or any other person participating in this process, and no negative inferences shall be drawn as a result of a refusal to accept such recommendations.

I. The ombuds may close an investigation at any time the ombuds determines that no further action is warranted and shall so notify the complainant, the subject or subjects of the investigation and the agency head. The ombuds shall also issue any reports as required by this section.

J. Decisions of the ombuds under this section may not be appealed to the board of ethics. (Ord. 18618 § 100, 2017: Ord. 16580 § 7, 2009).

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re Jared C. Karstetter Jr., Lawyer (Bar No. 17679).	Proceeding No. 17#00042 ODC File No. 16-01216 MOTION FOR ORDER OF DISMISSAL

1. Relief Requested

Under ELC 10.7(b), the Office of Disciplinary Counsel (ODC) moves for an order dismissing the grievance and the charges set forth in the Formal Complaint. Respondent Jared C. Karstetter joins in this motion.

2. Facts Relevant to Motion

Since the Formal Complaint was filed, ODC has received additional information and has interviewed a key witness whom Respondent would call at a disciplinary hearing in this matter. Based on this additional information and the witness's expected testimony, ODC believes that the grievance and the charges set forth in the Formal Complaint should be dismissed in the interests of justice.

3. Argument and Authority

ELC 10.7(b) provides that Disciplinary Counsel may dismiss charges at any time.

Under ELC 10.7(b), and with Respondent's agreement, ODC asks the hearing officer to enter the proposed AGREED ORDER OF DISMISSAL attached to this motion.

Dated this 18th day of January, 2018.

Scott G. Busby, Bar No. 17522
Senior Disciplinary Counsel

RECEIVED

JAN 26 2018

HOLLAND & KNIGHT

FILED

JAN 24 2018

DISCIPLINARY BOARD

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re Jared C. Karstetter Jr, Lawyer (Bar No. 17679).	Proceeding No. 17#00042 ODC File No. 16-01216 AGREED ORDER OF DISMISSAL

Based on the parties' agreement, the documents on file, and ELC 10.7(b), IT IS ORDERED that this grievance and the charges set forth in the Formal Complaint are dismissed, with each party to bear its own costs, expenses, and attorney fees.

Dated this 23 day of JAN, 2018.

William E. Eberharter
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the [illegible] to be [illegible] to the Office of Disciplinary Counsel and to the [illegible] postage prepaid on the 24th day of JAN.

Clerk's Mail to the Disciplinary Board

CERTIFICATE OF SERVICE

I, Morissa Knudsen, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare under penalty of perjury that on the date below, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

Party	Method of Service
Dmitri Iglitzin Katelyn Sypher Schwerin Campbell Barnard Iglitzin & Lavitt LLP 18 W. Mercer Street, Suite 400 Seattle, WA 98119	☐ Hand Delivery ☐ Legal Messenger ☐ Regular Mail ☒ E-served by Court ☐ E-Mail
Patrick N. Rothwell Davis Rothwell Earle & Xóchihua, PC 520 Pike Street, Suite 2500 Seattle, WA 98101	☐ Hand Delivery ☐ Legal Messenger ☐ Regular Mail ☒ E-served by Court ☐ E-Mail

Dated: July 9, 2018

Morissa Knudsen

LAW OFFICES OF JUDITH A. LONNQUIST, P.S.

July 09, 2018 - 2:38 PM

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